Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1807

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner, NATIONAL UNION FIRE INSURANCE COMPANY of PITTSBURGH, PENNSYLVANIA, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on February 13, 1980.

OPINIONS BELOW

The ruling, without opinion, of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 1a-2a. The opinion of the United States District Court, Middle District of Tennessee. Nashville Division, is reported at 436 F.Supp. 1078, and appears at Appendix B, infra, pp. 2a-16a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 13, 1980. See Appendix A, p. 1a, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

National Union Fire Insurance Company of Pittsburgh, Pennsylvania, brought suit against the United States pursuant to the Suits in Admiralty Act, 46 USC 742, et seq., to recover for loss suffered by its insured in March of 1975, when the Cumberland River enveloped the insured warehouse. The United States was sued because the activities of the Corps of Engineers in maintaining and improving the navigability of the Cumberland River, its tributaries and watershed allegedly caused the loss. The question thereby arising is:

1. Whether the action of the United States District Court for the Middle District of Tennessee in dismissing the claim of petitioner for want of admiralty jurisdiction is consistent with the decision of this Court and the lower federal courts interpreting the grant of admiralty and maritime jurisdiction conferred by Art. III, Sec. 2 of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Art. III, Sec. 2:

> "Section 2. The judicial Power shall extend . . . to all cases of admiralty and maritime Jurisdiction. . ."

46 USC 742:

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the

vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States."

28 USC 1333:

The district courts shall have original jurisdiction, exclusive of the courts of the United States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize."

STATEMENT OF FACTS

Because this case was decided on a Motion to Dismiss prior to any discovery being completed the only facts pertinent are those contained in the Complaint which must be accepted as true.

Those facts are:

"The United States of America is a sovereign which has consented to be sued under the Suits in Admiralty Act, 46 U.S. Code 742, *et seq.* The United States of America through the Department of Army, Corps of Engineers owned, operated and managed dams on the Cumberland River in the State of Tennessee and through employees and servants of said agency controlled the storage and release of water from reservoirs behind said dams on the Cumberland River for the purpose of navigation.

"On information and belief employees of the United States of America designed, built and maintained certain dams on the navigable stream known as the Cumberland River, for the purpose of developing navigation in that area.

"On information and belief during the months of January, February and the early part of March of 1975, employees of the United States of America observed and had knowledge of the height of water in the

Cumberland River and the depths of the pools and reservoirs controlled by the various dams.

"Waters were held in pools and reservoirs behind said dams on the Cumberland River and were negligently released by employees of the United States of America causing floods and damaging the property of Mitchell Steel, Division of NII Metal Services, Inc., at 600 Cowan Street, Nashville, Tennessee, to which rights Plaintiff has been subrogated. The aforesaid damage was not caused or contributed to by Plaintiff or anyone through or under whom it claims, but was caused by the failure, neglect and want of care on the part of the employees of Defendant in the following particulars among others which will be pointed out at the trial of this cause:

1. Defendant's employees negligently designed, built and maintained certain dams on the Cumberland River;

2. Defendant's employees failed and neglected to determine the effect of the storage and release of waters held back by the dams on or before March 13, 1975;

3. Defendant's employees delayed too long to release waters held in pools and reservoirs behind dams on the Cumberland River;

4. Defendant's employees released the waters held back by the dams too rapidly;

5. Defendant's employees neglected and failed to warn Plaintiff and those through whom Plaintiff claims of the negligent release of the said waters.

"By reason of the premises Plaintiffs have been compelled to pay under a policy of insurance No. IF 1010682 the sum of $2,916,934.01 and has incurred expenses of $110,744.59 and will incur future expenses and therefore has been damaged in the amount of $3,200,000.00 as nearly as the same can now be ascertained, and has therefore become subrogated to any claim, demand, right or rights of action which may exist in favor of Mitchell Steel, Division of NII Metal Services, Inc., and National Industries, Inc."

Following the filing of the Complaint, the United States filed a Motion to Dismiss on May 13, 1977, and on June 30, 1977, the Honorable L. Clure Morton issued a Memorandum Opinion and Order dismissing the suit of Petitioner. In the Memorandum Opinion, the Trial Court indicated that it would "decline to exercise admiralty jurisdiction in this case."

No discovery was undertaken as to the validity of Petitioner's allegations; instead, the Trial Court, presumably accepting the pleaded allegations as true, declined to exercise its jurisdiction.

This decision was timely appealed to the United States Court of Appeals for the Sixth Circuit which

affirmed, without opinion, on February 13, 1980. This Petition ensued.

In substance, the courts have ordered Petitioner out of court, even if the activities of the United States were clearly related to navigation, even if the activities of Petitioner were related to maritime commerce, and therefore properly within the admiralty and maritime jurisdiction of the Federal Judiciary.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the historic practice of this Court and the Congress of the United States to continually expand the scope of the constitutional admiralty and maritime jurisdiction.

In the first years following the Revolution, the young United States functioned much as it had during the colonial period and continued many of the customs and institutions developed here from British origins. The grant of admiralty and maritime jurisdiction to the federal courts contained in the Constitution was interpreted by the early federal cases to be a grant of the same sort of jurisdiction exercised at that time by the British High Court of Admiralty — jurisdiction over the seas to the ebb and flow of the ties. See *The Thomas Jefferson*, 10 Wheaton 428 (1825) and *Peyroux v. Howard*, 7 Peters 324 (1833).

Expansion had already begun by the early 1800's, however. In the Judiciary Act of 1789, Congress recognized the existence of admiralty jurisdiction over seizures under impost, navigation or trade laws if made on waters navigable by vessels of ten (10) or more tons. Justice Story, in *DeLovio v. Boit*, 2 Gallison 398, stated that American admiralty was broader than the British since it encompassed all things "pertaining to the sea" rather than merely the British scope of actions "arising from things done upon the sea." The British limitation on admiralty excluding claims for damage occurring within the body of a country though on a navigable waterway was rejected by the American court; *Waring v. Clarke*, 5 Howard 441 (1847).

The first major expansion of admiralty jurisdiction was the Act of February 26, 1845, which provided for the application of maritime law to incidents occurring on the Great Lakes and its connecting navigable waterways. The Act led indirectly to the Supreme Court decision in *The Genessee Chief*, 12 Howard 443 (1851), which rejected the tidal water limit on admiralty jurisdiction. The Court felt that the rapid growth of commerce on the inland waters created a need for a body of uniform law applicable to all areas where that commerce was undertaken. It was that maritime commerce which made admiralty jurisdiction suitable; there was nothing similarly peculiar about the effect of tidal ebb and flow. The admiralty jurisdiction granted by the Constitution was held to extend over all the public navig-

able waters of the United States on which commerce between different states or nations occurred. Jurisdiction was later expanded to include even artificial navigable canals wholly within the body of one state and subject to state ownership and control; *Ex parte Boyer*, 109 U.S. 629 (1884).

Admiralty jurisdiction was further extended in *The Blackheath*, 195 U.S. 361 (1904), which involved an attempt to recover damages to a beacon struck by a vessel. Since the beacon served a uniquely maritime purpose as a fixed navigational aid, the claim for damages was held cognizable in admiralty. Torts involving structures which are aids to navigation fall within admiralty jurisdiction.

More recently in the Admiralty Jurisdiction Extension Act of 1948 46 U.S.C. 740, Congress further extended the admiralty jurisdiction in matters of tort. The act provides that damages caused by a vessel on navigable waters form the basis of an admiralty claim even if those damages occurred on land. Thus a claim for damages caused by a fire on a vessel which spreads to a land structure is a claim within the admiralty or maritime jurisdiction of the federal courts.

Clearly Congress and the federal courts have responded to the growth and evolution of maritime activities and commerce by expanding the scope of the admiralty jurisdiction. The activities of the Corps of

Engineers in maintaining and improving the navigability of certain waterways are an integral part of that maritime commerce. Surely the need for uniformity and certainty of result which encouraged the earlier expansions of admiralty jurisdiction dictates that claims against the Corps arising out of these activities should be claims in admiralty. The contrary view taken by the district court and the Sixth Circuit conflicts with the prior policies of Congress and the courts favoring expansion and should be reviewed by this Court.

2. A uniform policy for the interpretation of the Executive Jet case should be enunciated as the court below and other courts have adopted varying interpretations of the effect of Executive Jet on the existing jurisdictional parameters.

As is adverted to hereinbefore, until this court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493 (1972) the scope of the federal admiralty and maritime jurisdiction was almost constantly expanded. The decision in *Executive Jet,* while apparently restricting this growth, simply did away with a mechanistic "locality" test and substituted therefor the "maritime connection" thesis.

The specific question which is here raised is the scope of the phrase "a significant relationship to traditional maritime activity."

That question has been answered in favor of a finding of jurisdiction in two (2) cases similar to this case. A boat owner whose vessel was damaged by a missile negligently fired from a U.S. Navy aircraft has been held to be within the admiralty jurisdiction, *T. J. Falgout Boats, Inc. v. United States,* 508 F.2d 855 (CA9-1974) cert. den. 421 U.S. 1000, 95 S.Ct. 2398 (1975), and adjacent landowners have been held entitled to recover, in admiralty, from the owner of a cement terminal for dust negligently discharged into the air in unloading operations of bulk carriers. *Parsell v. City Lumber Company,* 1977 A.M.C. 1704 (D. Conn.-1976). A comparison of these results with the result here demonstrates the emphasis placed by the court on the locality only test.

This court should determine the permissible and authorized reach of the admiralty jurisdiction in view of the uncontroverted allegations in this case that the activities of the United States Army's Corps of Engineers in aiding navigation are at the root of the damage in this case. The ruling of the Court below, although agreeing, in principle, with Petitioner's point of view, only pays lip service to it and reinstitutes a strict "locality" test.

This action of the court cannot be reconciled with the "significant relationship to traditional maritime activity" requirement set forth in *Executive Jet.* Indeed, even in cases predating *Executive Jet,* courts have recognized the traditional connection criteria as in *Spann v. Lauritzen,* 344 F.2d 204 (CA3-1965).

In a significant decision, *Kelly v. United States*, 531 F.2d 1144 (CA2-1976) the Court upheld the admiralty jurisdiction with respect to the United States Coast Guard rescue activities. In that case, the court observed that the critical question was not whether pleasure boat cases, the type of boat involved, fell within admiralty jurisdiction, but whether rescue cases involving the United States Coast Guard fit within the admiralty jurisdiction.

Viewing this case in that fashion, the question is not whether this particular petitioner falls within the admiralty jurisdiction, but whether the activities of the United States Army's Corps of Engineers with respect to providing for and maintaining the navigability of waters falls within the admiralty jurisdiction.

The emphasis of the District Court on the property damaged should be reviewed by this Court and that aspect of *Executive Jet* clarified. The activities of the Corps of Engineers in generating a flood by improper management of aids to navigation, the dams, pools and reservoirs, should be classified and categorized by this Court. For example, as the Judge below indicated, he would have no problem in finding this matter to be within the admiralty and maritime jurisdiction if the flood had, instead of damaging steel, damaged a vessel located on the Cumberland River. Such a distinction is plainly contraindicated by *Executive Jet* and the Petitioner should have the opportunity to establish prior to final adjudication of its claims whether or not the

Corps of Engineers was actually engaged in works involving navigable waters as opposed to its other tasks.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States District Court for the Middle District of Tennessee as affirmed without opinion by the United States Court of Appeals for the Sixth Circuit.

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COUNSEL FOR PETITIONER

This 13th day of May, 1980.

CERTIFICATE OF SERVICE

It is certified that three copies of the foregoing Petition were served on Hal D. Hardin, U.S. Attorney, 879 U.S. Courthouse, Nashville, TN 37203, Counsel for Respondent, as required by Rule 33-1 of this Court.

This the ____ day of May, 1980.

W. GERALD GAUDET

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-1603

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PENNSYLVANIA,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Filed: February 13, 1980

ORDER

Before: WEICK and BROWN, Circuit Judges; and PECK, Senior Circuit Judge.

Upon consideration, the judgment below is affirmed on the memorandum opinion of Chief District Judge L. Clure Morton, filed June 30, 1977 (436 F.Supp. 1078), for the reasons stated therein.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
/s/ BARBARA J. BURNS
Deputy Clerk

ISSUED AS MANDATE: March 17, 1980
COSTS: NONE

APPENDIX B

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PENNSYLVANIA

versus No. 77-3119-NA-CV

UNITED STATES OF AMERICA

Filed: June 30, 1977

MEMORANDUM

This action is before the court on the motion to dismiss filed by the defendant United States of America ("the Government"). The suit was filed by the plaintiff insurance company as subrogee to the rights of a steel company which suffered water damage to a quantity of its stock stored in a warehouse. The damage resulted from flooding by the Cumberland River. Plaintiff maintains that the Government, through the Army Corps of Engineers, negligently failed to exercise proper flood control procedures in connection with its maintenance of certain dams on the Cumberland. As a result, plaintiff contends, rapidly rising waters inundated a portion of its insured's plant, located on or near the banks of the river.

Plaintiff seeks to bring this suit pursuant to the Suits in Admiralty Act, 46 U.S.C. §§741-752, and in particular, under §742, which provides for a limited waiver of sovereign immunity and sets out the procedure for suits in admiralty against the United States. Although plaintiff has failed to plead a jurisdictional basis, jurisdiction presumably is predicated on 28 U.S.C. §1333.

Section 742 provides in pertinent part as follows:

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . ."

Prior to 1960, §742 provided only for suits involving "a vessel" or "cargo" owned, operated, or possessed by the United States. The section was amended in that year, however, to include, *inter alia*, the phrase "or if a private person or property were involved." The intended meaning of that phrase has been the subject of juridical disagreement,[1] but the legislative history[2] as well as the decided weight of judicial authority[3] strong-

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1 *Compare* J. W. Peterson Coal & Oil Co. v. United States, 323 F.Supp. 1198 (N.D. Ill. 1970) *with* Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976).

2 *See, e.g.*, Senate Report No. 1894, 86th Cong., 2d Sess., 1960 U.S. Code Cong. & Admin. News, p. 3583 et seq. *See also*, Senate Report No. 92-1079, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News, p. 3129 et seq. While the latter report was issued some twelve years after the fact, and thus, in the words of the court in Richmond Marina Panama, S.A. v. United States, 350 F.Supp. 1210, 1219-1220 (S.D. N.Y. 1972), "is not binding on the courts" since it merely constituted "subsequent Congressional explanation of the meaning of a statute. . ." it is nonetheless a very good indication of what Congress had in mind during the course of its prior enactment. *See* Gercey v. United States, 409 F.Supp. 946 (D. R.I. 1976), *aff'd*, 540 F.2d 536 (1st Cir. 1976).

3 *See, e.g.*, Kelly v. United States, *supra;* DeBardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971); Szyka v. United States Secy. of Defense, 525 F.2d 62 (2d Cir. 1975); T. J. Falgout Boats, Inc. v. United States, 369 F.Supp. 838 (C.D. Cal. 1972), *aff'd*, 508 F.2d 855 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000, 95 S.Ct. 2398, 44 L.Ed.2d 667 (1975); Roberts v. United States, 498 F.2d 520 (9th Cir. 1974), *cert. denied*, 419 U.S. 1070, 95 S.Ct. 656, 42 L.Ed.2d 665 (1974); Richmond Marine Panama, S.A. v. United States, *supra;* Tankrederict Gefion A/S United States, 241 F.Supp. 83 (E.D. Mich. 1964); Gercey v. United States, *supra;* Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968); United Continental Tuna Corp. v. United States, 499 F.2d 774 (9th Cir. 1974).

ly suggests that the addition of the phrase was intended by Congress as an extension of the statute's waiver of sovereign immunity to *all* suits sounding in admiralty, not just those involving vessels or cargo. Thus in the instant case, it would appear that the absence of a vessel or a ship's cargo would not *ipso facto* defeat application of section 742. What must still be determined, however, is whether the injury suffered in this case is one which does in fact sound in admiralty.

The scope of admiralty jurisdiction in the area of torts has traditionally been limited to wrongs committed on the high seas or navigable waters of the United States. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971). Upon this basic jurisdictional principle, often referred to as the strict locality rule, there have been engrafted four modifying doctrines, two of which have generally operated to expand admiralty jurisdiction while the other two have generally operated to constrict it.

The first of these doctrines was enunciated by the Supreme Court in *The Blackheath*, 195 U.S. 361, 25 S.Ct. 46, 49 L.Ed. 236 (1904), a case involving a collision between a vessel and a beacon resulting in damage to the latter. The beacon was completely surrounded by water, but was attached to the sea floor. Thus, technically, it was a part of the realty under common law and hence outside of admiralty jurisdiction. The court, however, observing the uniquely maritime purpose of

the beacon, saw fit to extend admiralty jurisdiction to such a situation. Thus was born what has come to be known as the "damage to fixed navigational aid structures" exception to the strict locality rule Under this doctrine, a tort involving a structure which is (1) completely surrounded by navigable waters, and (2) an aid to navigation, falls within admiralty jurisdiction.

The other extension of the strict locality rule was legislatively created in 1948 with the enactment of the Admiralty Jurisdiction Extension Act, 46 U.S.C. §740. What that act in effect provides is that injuries caused by a vessel upon navigable waters, whether the injury is consummated on the water or upon land, are cognizable in admiralty. This law constituted a Congressional response to the Supreme Court's holding in an early case, *The Plymouth*, 70 U.S. (3 Wall) 20, 18 L.Ed. 125 (1966), where the Court refused to extend admiralty jurisdiction to a case in which a shipboard fire spread to a dock, doing extensive damage.

The Court's refusal in *The Plymouth* to extend admiralty jurisdiction to dockside injuries illustrates one of the restrictive aspects of the strict locality rule which, absent applicability of the Extension Act, still circumscribes admiralty jurisdiction. Commonly known as the "extension of land" doctrine, this rule denies admiralty jurisdiction to injuries occurring on bridges, piers, docks, jetties, ramps, railways and the like, which though they may extend over or actually

project into and beneath navigable waters, are nonetheless considered so integrated into the mainland that they are treated as a part of it. *See, e.g., T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520 (1928); *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946).

The other limitation on the locality rule, which has gained increasing popularity in recent years, is what may be termed the "maritime connection" doctrine. This rule, also referred to as the "locality plus" test, requires that in addition to a maritime locality, the tort at issue must involve or be connected with some maritime activity. In other words, the injury must arise out of some activity traditionally associated with navigation, commerce on the water, or other conduct peculiarly related to maritime afairs, before admiralty jurisdiction can be assumed. This doctrine is not a new one; it was enunciated as early as 1893 by the Ninth Circuit in *Campbell v. H. Hackfield and Co.*, 125 F. 696 (9th Cir. 1893). It enjoyed a degree of favor in other circuits in the years that followed, *see, e.g., Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), though it was not universally accepted, *see, e.g., Weinstein v. Eastern Air Lines, Inc.*, 316 F.2d 758 (3d Cir. 1963), In 1972, however, the Supreme Court had occasion to consider the so-called "locality-plus" test and adopted its basic requirement that something more than mere maritime locale was necessary in order to give federal courts admiralty jurisdiction of an airline accident occurring

on navigable waters. *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1973). It thus seems clear, at least in this circuit, in light of the *Chapman* and *Executive Jet* decisions, that the "maritime connection" doctrine prevails.

In viewing the facts of the instant case, it is immediately apparent that the two "jurisdiction-expanding" doctrines are inapplicable. Since the property damaged in this case was not in any sense of the term a "navigational aid," the first doctrine discussed above has no pertinence. Similarly, inasmuch as no "vessel" was involved in the complained-of accident, the Extension Act is inapplicable.

The two "jurisdiction-restricting" doctrines, however, require closer examination. The "extension-of-land" doctrine, as stated previously, is of primary importance in cases where the tort occurs on a structure, such as a bridge, ramp, or pier, which may be so erected as to extend over or into navigable waters. In these cases the courts have traditionally withheld admiralty jurisdiction by reference to the strict locality rule, reasoning that the structure, even though surrounded by — and in cases, partially submerged in — water, has a character more terrene in nature than acquatic. References are frequently made to the "purpose and use" of such structures, *see, e.g., Hastings v. Mann,* 340 F.2d 910, 912 (4th Cir. 1965), *cert. denied,* 380 U.S. 963, 85

S.Ct. 1106, 14 L.Ed.2d 153, with the suggestion that they are "connected with the shore and immediately concerned with commerce upon land." *Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co.*, 208 U.S. 316, 321, 28 S.Ct. 414, 52 L.Ed. 508 (1908). While the situs of the alleged tort in the instant case — a steel warehouse on or near the shore of a navigable stream — does not fit neatly into the mold of structures usually associated with the extension-of-land doctrine, the principles underlying that doctrine are particularly applicable to the situation in this case. The warehouse in question was built upon the land, perhaps (as in the case of a dock or pier) purposely near the water for facilitating shipment of portions of the steel stored within it. (Indeed, plaintiff suggests just such a possibility on page 2 of its memorandum in opposition to defendant's motion to dismiss). The "purpose and use" of the warehouse were clearly terrestrial, the structure being "immediately concerned with commerce upon land." Indeed, its only arguable connection with the water existed, as suggested above, in a transportation context. Thus, while the instant case presents a "mountain coming to Mohammed" situation in which the river rose to partially inundate the warehouse, rather than the warehouse being purposely constructed over or within the river's natural flow, as in the typical extension-of-land case, the nature of the instant tort is not unlike that in cases where the extension-of-land doctrine is invoked to defeat admiralty jurisdiction.

Another feature which distinguishes this action from most extension-of-land cases is that it is the water itself which has been the principal agent of destruction. Even such a unique factual circumstance, however, is not without precedent in such cases. In *Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., supra,* the Court refused to recognize admiralty jurisdiction where some vessels broke loose from their moorings in the Cuyahoga River near Cleveland, Ohio, drifted downstream, collided with a bridge piling and dock, doing extensive damage, became wedged together between the piling and dock thereby partially damming the stream, causing the water to rise, increasing the velocity of the current underneath the keels of the vessels, which caused extensive damage to the bridge piling. The Court reasoned, as indicated previously, that the bridge and dock

> "pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such."
>
> 208 U.S. at 321

So it is in the instant case. Indeed, the warehouse was not merely an "extension" of the shore, but an integral part of it, whose contiguity to navigable water was the freak result of a flood. Under ordinary conditions, the

warehouse would never have been within the flow of the Cumberland, even at its high-water mark,[4] which is traditionally considered the outer limits of a navigable stream for purposes of recognizing admiralty jurisdiction. *See* 2 *Benedict on Admiralty*, §5, p. 1-41 (7th rev. ed. 1975). In light of these considerations, then, this court is constrained to conclude that adherence to the spirit of the locality rule dictates rejection of admiralty jurisdiction in this case.

Even were this court to find, however, that the locality of the alleged wrong in this case was susceptible to admiralty's reach, application of the "maritime connection" doctrine would be fatal to jurisdiction under admiralty law.

As indicated previously, the doctrine requires that in addition to a maritime locale, the alleged tort must arise out of some activity which can legitimately be characterized as maritime in nature. Plaintiff contends that the maintenance of dams and water levels by the Corps of Engineers is an inherently maritime activity, since one of its main purposes is as an aid to navigation. Thus, plaintiff argues, inasmuch as the proximate result of said activity was the flood damage complained

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4 The "high-water mark" of a navigable river is the line to which high water *ordinarily reaches* and is *not* the line reached by water in unusual floods. It is that line below which soil is unfit for vegetation or agricultural purposes. State v. Bonelli Cattle Co., 108 Ariz. 258, 495 P.2d 1312 (1972); Union Sand & Gravel Co. v. Northcott, 102 W.Va. 519, 135 S.E. 589 (1926).

of, the maritime connection clearly exists in this case. Defendant rejects this analysis as improperly focusing upon the activities of the Corps rather than upon those of plaintiff's insured, arguing that the maintenance of a warehouse has nothing whatever to do with maritime activities. The cases addressing the issue suggest that plaintiff's analysis is probably the more accurate approach in applying the doctrine; that is, the range of activities undertaken by the Government, when such have caused injury to the plaintiff, are what must be examined in determining the existence *vel non* of a "maritime connection."

This principle is exemplified in the case of *Kelly v. United States*, 531 F.2d 1144 (2d Cir. 1976). In that case, the plaintiff maintained the U.S. Coast Guard had negligently failed to rescue his decedent after the latter was involved in a sailboat accident on Lake Ontario. The plaintiff, seeking to bring the claim under the Federal Tort Claims Act, which excludes from its coverage actions sounding in admiralty, 28 U.S.C. §2680(d), argued that the cause of action arose out of a pleasure-boating accident, an activity outside the scope of admiralty jurisdiction. In rejecting this argument, the court stated:

> "We believe, in any case, that this suit is not merely a 'pleasure boat accident case.' In fact, the case only tangentially involves boats at all. It primarily involves water rescue operations.

> The objects of the rescue could just as well have been fatigued swimmers as capsized boaters. The critical question, therefore, is not, as both parties have tended to frame it, whether pleasure boat cases fall within admiralty, but rather whether rescue cases involving the United States Coast Guard fit within this category. Viewing the case in this way, we conclude that rescue operations of the Coast Guard conducted on navigable waters do in fact bear a significant relationship to traditional maritime activities for purposes of admiralty jurisdiction."
>
> 531 F.2d at 1147

It thus appears clear that the proper focus in applying the maritime connection doctrine is the activity being carried on by the destructive party. However, this perspective does not obviate the necessity to apprise the activity in terms of its actual effects as well as its general nature. Thus, while control of the water level does generally involve considerations affecting navigation and commerce upon the water, the only actual impact of concern in this instance is the flooding of a shore-based warehouse. Viewed in this way, it becomes more difficult to perceive an actual maritime incident for which the unique principles and procedures of admiralty are pertinent. Had the rising water caused boats to break from their moorings and sustain damage, or inundated a barge and destroyed its cargo, this court would have little difficulty in finding admiralty

jurisdiction. However, where the actual untoward consequences is of a kind which can readily be dealt with by resort to established common law tort principles, it makes no sense to dredge up (no pun intended) a whole body of law whose purpose and history is inextricably bound up in matters concerning maritime commerce. It should not be overlooked that the navigability of the Cumberland, which is a *sine qua non* of admiralty jurisdiction, had nothing whatever to do with the injuries sustained in this case. It is not inconceivable that a stopped up storm drain, during an abnormally heavy rainfall, could have resulted in essentially the same damage to the material in the warehouse. And in such a case, a suit against the municipality (assuming no immunity) alleging negligent failure to keep the sewers cleared of debris, could easily be disposed of within the contours of state tort law. The fact that the alleged culprit in the instant case was the Corps of Engineers and that the destructive force happened to be a navigable stream does not alter the availability, viability, and indeed, the preferability of state law for disposing of this case.

The reasoning above is not without precedent. In *Onley v. South Carolina Elec. & Gas Co.*, 488 F.2d 758 (4th Cir. 1973), the court determined that there was no admiralty jurisdiction where a diver was injured when he struck a submerged boat ramp in a navigable lake, the water level of which was controlled by a power company in connection with the operation of a hydroelectric generating plant. In reaching its conclusion, the court made the following observations.

navigable lake, the water level of which was controlled by a power company in connection with the operation of a hydroelectric generating plant. In reaching its conclusion, the court made the following observations.

> "We hold that appellee's control of the water level of a lake for the purpose of generating electricity, which results in a diving accident, does not bear a sufficiently significant relationship to traditional maritime activity to create federal admiralty jurisdiction. While the control of the water level of a navigable waterway may, in some cases, have an intimate relationship with maritime activities, there is no such maritime connection where a diving accident is the only consequence. The uniform body of rules and the expertise of admiralty are irrelevant to the issues in a diving accident. Conversely, the state tort law is most directly concerned with such accidents, and is quite capable of resolving the present controversy without any effect on the federal interest in maritime activities."
>
> 488 F.2d at 760

See also the thoughtful discussion of Judge Smith in *Adams v. Montana Power Co.*, 354 F.Supp. 1111 (D. Mont. 1973), *aff'd*, 528 F.2d 437 (9th Cir. 1975), and the reasoning of the Sixth Circuit in *Chapman v. City of Grosse Pointe Farms, supra.*

For the foregoing reasons, this court will decline to exercise admiralty jurisdiction in this case. An appropriate order will be entered dismissing this cause. Plaintiff is, of course, free to pursue any remedies it may have through the proper administrative channels of the Federal Tort Claims Act.

/s/ L. CLURE MORTON
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

(Number and Title Omitted)

Filed: June 30, 1977

ORDER

In accordance with the Memorandum contemporaneously filed, it is hereby ORDERED that this cause is dismissed.

/s/ L. CLURE MORTON
UNITED STATES DISTRICT
JUDGE

Supreme Court, U.S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1807

In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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Department of Justice
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the flooding of its insured's building, allegedly caused by water control activities of the United States Army Corps of Engineers, gives rise to admiralty jurisdiction under Section 2 of the Suits in Admiralty Act, 46 U.S.C. 742.[1]

1. Petitioner, as subrogee to the rights of a steel company whose warehouse suffered damage when the Cumberland River flooded during an abnormally heavy rainfall, brought suit in the United States District Court

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[1]Section 2 provides in pertinent part:

> In cases where * * * if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *.

for the Middle District of Tennessee alleging that the flooding was caused by the negligence of the Army Corps of Engineers in releasing water over dams it maintained in the area. Petitioner sought to invoke admiralty jurisdiction on the theory that the location and nature of the injury and the activities of both petitioner and the Corps of Engineers were related to maritime navigation and commerce (Pet. 8-14). The district court concluded that it lacked jurisdiction and granted the government's motion to dismiss, holding that neither the location of the injury nor the activities involved were sufficiently maritime to warrant invocation of admiralty jurisdiction (Pet. App. 11a). In addition, the court concluded that the issues in this case could be resolved without resort to the unique principles of admiralty (Pet. App. 14a) and that petitioner was free to pursue its remedies under the Federal Tort Claims Act (Pet. App. 16a). The court of appeals affirmed, relying on the reasons set forth in the district court's opinion (Pet. App. 1a).

2. The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Therefore, further review is unwarranted.

First, the wrong complained of did not occur on navigable waters. As the district court observed (Pet. App. 10a-11a; footnote omitted), "the warehouse was * * * an integral part of [the shore], whose contiguity to navigable water was the freak result of a flood. Under ordinary conditions, the warehouse would never have been within the flow of the Cumberland, even at its high-water mark, which is traditionally considered the outer limits of a navigable stream for purposes of recognizing admiralty jurisdiction." The situation here is like that in *The Arkansas*, 17 F. 383 (S.D. Iowa 1883), wherein the court concluded that admiralty jurisdiction did not extend to claims arising out of a collision between a flood-tossed

ship and an oil depot situated on dry land. "The plaintiff's property was unquestionably situated upon land, and not upon the water or within the river. It would be doing violence to language to say that the oil depot in question was not upon land. Can we, then, say that because the river, in an extraordinary and unusual flood, rose up to and around the oil depot, and floated the steamer upon the plaintiff's property, the tort complained of was not upon land?" *Id.* at 389. Were such the case, "admiralty jurisdiction [w]ould come and go with the rise and subsidence of the river, to be succeeded in its turn by that of the common law * * *." *Ibid.*

Second, the injury sustained in this case was not sufficiently related to traditional maritime activity to justify admiralty jurisdiction. *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972).[2] Several factors have been identified as useful guides in determining whether a maritime nexus exists: the functions and roles of the parties to the alleged tort; the types of "vehicles and instrumentalities" involved; the cause of and type of injury; and the applicability of "traditional concepts of the role of admiralty law." *Kelly* v. *Smith*, 485 F. 2d 520, 525 (5th Cir. 1973). Here, the injured party, a steel company, does not engage in maritime activity. The alleged tortfeasor, the Army Corps of Engineers, constructs and maintains flood control projects, but that activity is directed primarily at promoting commercial activity on land. The injury complained of was caused by flooding following a severe rainstorm, and not by the negligent

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[2]As petitioner recognizes (Pet. 11), this Court stated in *Executive Jet* (409 U.S. at 261) that, "in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test."

operation of a ship or other maritime instrumentality. And neither the flooding nor the circumstances under which it is alleged to have occurred touches upon "matters with which admiralty is basically concerned." *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra*, 409 U.S. at 270. Thus, the court below correctly concluded that petitioner failed to satisfy the maritime nexus test.

3. Even assuming *arguendo* that petitioner asserted a claim cognizable in admiralty, there exists an independent bar to recovery. 33 U.S.C. 702c provides, in pertinent part, that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." The statute was intended to apply to precisely the situation in this case. "The language used shows Congressional anticipation that it will be claimed after the happening of floods that negligence of government employees [in operating flood control projects] was a proximate cause of damages where floods or flood waters have destroyed or damaged goods." *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 271 (8th Cir.), cert. denied, 347 U.S. 967 (1954). This immunity from liability is complete. It applies where flooding is caused in part by the negligent design of a flood control project (*Florida East Coast Ry.* v. *United States*, 519 F. 2d 1184, 1191-1193 (5th Cir. 1975)), where negligence is the sole cause of the flooding (*Sanborn* v. *United States*, 453 F. Supp. 651 (E.D. Cal. 1977)), and where the waters involved are backwaters as distinguished

from floodwaters (*Taylor* v. *United States*, 590 F. 2d 263 (8th Cir. 1979)). It accordingly is applicable here.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

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[3]Some cases have limited Section 702(c) immunity to claims arising out of the negligent design, construction, operation or maintenance of federal flood control projects. See, *e.g.*, *Graci* v. *United States*, 456 F. 2d 20, 25-27 (5th Cir. 1971); *Peterson* v. *United States*, 367 F. 2d 271, 275-276 (9th Cir. 1966). However, inasmuch as the injury complained of by petitioner allegedly resulted from flood control operations engaged in by the Army Corps of Engineers, the United States is immune from liability even under a narrow reading of the statute.